No. 93-397

In The

Supreme Court of the United States

October Term, 1993

ASSOCIATED INDUSTRIES OF MISSOURI, *ET AL.*,

Petitioners,

v.

JANETTE M. LOHMAN,
DIRECTOR OF REVENUE, *ET AL.*,

Respondents.

On Writ Of Certiorari
To The Supreme Court Of Missouri

AMICUS CURIAE BRIEF OF MULTISTATE TAX COMMISSION IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Is Missouri's statewide, uniform local government use tax law consistent with the Commerce Clause of the United States where it (i) was not adopted as a measure of "economic protectionism"; (ii) was, in part, enacted in response to the concerns expressed by this Court in *National Bellas Hess, Inc. v. Department of Revenue of Ill.*, 386 U.S. 753 (1967) in an effort to eliminate potential use tax compliance burdens on interstate marketers in 1,573 political subdivisions; (iii) discriminates, if at all, in a *de minimis* degree against interstate commerce; and (iv) has no other reasonable alternative to solving the State's legitimate interests?

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STATEMENT OF INTEREST OF AMICUS CURIAE MULTISTATE TAX COMMISSION

The Multistate Tax Commission ("MTC" or "Commission") is the official administrative agency

of the Multistate Tax Compact ("Compact"). Currently, the Compact has been entered into by nineteen states and the District of Columbia as full members; and thirteen additional states have joined the Commission as associate members.[1] The stated purposes of the Compact are to:

1. Facilitate proper determination of State and local tax liability of multistate taxpayers, including the equitable apportionment of tax bases and settlement of apportionment disputes.

2. Promote uniformity or compatibility in significant components of tax systems.

3. Facilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration.

4. Avoid duplicative taxation.

As reflected by these four basic principles, the Commission possesses vital and continuing interest

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[1] The current full members are the states of Alabama, Alaska, Arkansas, California, Colorado, District of Columbia, Hawaii, Idaho, Kansas, Minnesota, Missouri, Michigan, Montana, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah, and Washington. The associate members are the states of Arizona, Connecticut, Georgia, Louisiana, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, Ohio, Pennsylvania, Tennessee and West Virginia.

in those state tax issues that may affect the administration of state tax systems. In particular, the Commission supports those efforts by the states that seek, either individually or jointly, to facilitate taxpayer convenience in complying with state registration, collection, and remittance requirements under their income and sales and use tax laws.

The Commission also abides by another critical principle that is correlative to its four stated principles – the preservation of our federalist form of government. The issues contained in this case, therefore, touch upon the Commission's overall responsibility to promote and support appropriate state efforts to innovate and develop more sophisticated and efficient methods of taxing interstate businesses conducting activities within their jurisdictions. The Commission perceives Missouri's adoption of § 144.748, RSMo. Supp. (1991) as representing, in substantial part, that state's effort to avoid the unreasonable burdening of interstate commerce that was of concern to this Court in *National Bellas Hess v. Department of Revenue of Ill.*, 386 U.S. 753 (1967). Those concerns were repeated in *Quill Corp. v. North Dakota*, 504 U.S. ___, 112 S.Ct. 1904 (1992), and played a major part in the Court's recognition of a bright-line, physical presence test for Commerce Clause purposes in the use tax/mail order context.

SUMMARY OF ARGUMENT

At issue here is Missouri's effort to bring closer to parity the sales and use tax rates imposed on interstate and intrastate sales, while, at the same time, reducing the compliance burdens on interstate businesses that are associated with the collection of local government use taxes. In *Bellas Hess* and *Quill,* this Court was clearly concerned with the complexity faced by interstate mail order sellers in complying with state and local governmental use taxes nationwide. While this complexity is nowhere near the level that the mail order industry representatives portrayed in *Quill,* it remains to be appropriately addressed by the states. Despite the references to the "Nation's 6,000-plus" taxing jurisdictions, a statistic upon which this Court heavily relied in *Quill,* a closer analysis of the laws of all sales/use tax states shows that even a mail order company with nationwide use tax collection responsibilities would have to file only one return in 40 states and fewer than 200 in the remaining seven with state and/or local sales taxes.

Missouri's effort to bring parity to the taxes imposed on intrastate and interstate sales was to apply a uniform use tax rate to all units of local government. For the reasons set out below, this simplified method of calculating the local use tax should be upheld against any type of Commerce Clause challenge. This is especially critical given the fact that Congress has yet to pass any legislation that addresses the huge use tax problem that has arisen in the mail order context.

ARGUMENT

I. MISSOURI'S USE TAX SYSTEM DOES NOT VIOLATE THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION

A. The Local Use Tax Compliance Burden and Missouri's Response

In 1991, the Missouri General Assembly found its sales and use tax system as substantially favoring out-of-state sellers over its in-state retailers. Prior to the adoption of § 144.748, RSMo. Supp. (1991), the Missouri law provided for a uniform statewide sales tax rate of 4.225%, a uniform statewide use tax rate of 4.225%. While authority was delegated to each local government to impose additional local sales taxes on sales made within its jurisdiction, no corresponding or complementary local government use tax was authorized. Thus, under the tax system existing prior to the enactment of § 144.748, "these permissive sales tax statutes resulted in an aggregate sales tax rate higher than 4.225 percent in the vast majority of counties and municipalities in the state, while the use tax on similar transactions made outside the state remained at 4.225 percent." *Associated Industries of Missouri v. Director of Revenue*, 857 S.W.2d 182, 185 (Mo. *banc* 1993) (Pet. for *Writ of Certiorari*, Appendix A at 3-4). In most instances, therefore, purchasers of goods from an in-state retailer were required to pay more in total state and local sales taxes than purchasers buying from out-of-state mail order and other remote sellers, irrespective of whether such out-of-state sellers had nexus with Missouri,

because no local use tax existed to complement the local sales tax. In its effort to address the discrimination against its in-state retailers, the Missouri General Assembly eventually enacted a statewide use tax at the uniform rate of 1.5% to be collected by the state and distributed to the local governments in proportion to the amount of sales taxes imposed in the respective local jurisdictions.

The Missouri General Assembly could have elected in 1991 to correct the discrimination against in-state retailers by delegating to its local governments the power to impose and collect on interstate transactions a local use tax at a rate equivalent to the local sales tax rate applied in the respective local government jurisdiction. In fact, as originally introduced, H.B. 960 set that very course. If H.B. 960 had become effective, mathematical precision would have been achieved; but, all sellers required to collect local use taxes would surely have complained of an undue burden being placed upon interstate commerce arising from the need to track potentially differing local use tax rates throughout the 1,573 local jurisdictions possessing authority to levy sales taxes.

In an effort to reduce administrative burden, the Missouri General Assembly enacted legislation that protected out-of-state sales transactions from all burdens associated with identifying the local taxing jurisdiction(s) into which goods are delivered and of tracking the applicable local use tax rates in those jurisdictions. To provide this protection, the statewide uniform local use tax rate was

enacted. Under the legislation, out-of-state sellers having nexus in Missouri or otherwise collecting Missouri transactional taxes on their sales destined for Missouri residents would have to apply only one tax rate – 5.725 percent – to all of their taxable sales. For filing and remittance purposes, only one state form was required to be completed; no geographical accounting with respect to the 1,573 local jurisdictions was required; and payment of the state and local use taxes was made to one place – the Missouri Department of Revenue, which was then responsible for distributing the local use tax portion to the local governments. See, § 144.748. In application, the Missouri Supreme Court found upon stipulated facts that under the new legislation –

> "93.14 percent of all taxable sales made in Missouri were subject to an aggregate [state and local] sales tax rate of 5.725 percent or higher. Of those sales, 55.32 percent were subject to an aggregate sales tax rate in excess of 5.725 percent, with some aggregate sales tax rates as high as 7.5 percent. However, 6.86 percent of the taxable intrastate sales were subject to a sales tax rate less than 7.725 percent . . . ". *Id.* at 185.

The statistical fact most telling of all, however, is that found by the trial court when it concluded that "[i]t is apparent to the Court, and the Court so finds and concludes, that intrastate sales in Missouri in the calendar year 1990 were subject to a local sales tax burden of approximately $100,000,000 *over* what would have been generated

by application of a uniform sales [use] tax rate of 1.5% in all locales." See Petition for *Writ of Certiorari*, Appendix B at A-38, fn. 1 (emphasis added). This conclusion alone demonstrates that, in practical effect, Missouri's newly adopted use tax system did not discriminate against interstate transactions; and that it retained, albeit to a lesser degree, its rate bias against in-state sales transactions.

B. The Missouri General Assembly Has Addressed the Concerns That This Court Relied Upon for its Decisions in *Bellas Hess* and *Quill*

In *Bellas Hess* and *Quill*, the majority of the Court was concerned with the administrative burdens that might result from mail order sellers having to comply with the use tax laws of all state and local jurisdictions nationwide. The suggestion of "6,000 plus" taxing jurisdictions placed before this Court by Quill and its *amici* was misleading and made to raise the specter of 6000 separate returns on 6000 different tax bases.[2] The practical reality of nationwide use tax compliance is far more benign.

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[2] *Quill*, 112 S.Ct. at 1913, fn. 6. In *Quill*, the number of jurisdictions in the United States levying sales and use taxes was variously suggested to the Court as "approximately 6500 jurisdictions" Brief of Petitioner Quill at 36; "45 states and 7000 local governments" *Id.* at 39; and "45 states (plus the District of Columbia) and over 6,100 local governments." Brief of *Amicus* Direct Marketing Association at 16.

For example, even if a nationwide mail order business were to have a requisite nexus with every state and every local taxing jurisdiction throughout the United States, it would be required to file a maximum of *230*, not *6,000 plus*, use tax returns during any tax period. This is because in 20 states there are *no* local government use taxes and in another 20 the state administers all local use taxes and the local use tax reporting occurs as part of the state return; the remaining 7 states – Alabama, Alaska, Arizona, Colorado, Idaho, Louisiana and Minnesota – account for over 80 percent (190) of the 230 use tax returns that would be required to be filed nationwide.[3]

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[3] No local sales or use taxes are imposed in Connecticut, the District of Columbia, Hawaii, Indiana, Kentucky, Maine, Maryland, Massachusetts, Michigan, New Jersey, Rhode Island, Vermont, or West Virginia. NATIONAL SALES TAX RATE DIRECTORY (Vertex, Inc.)(1994). Local sales taxes are imposed but no local use taxes are permitted in Illinois, Iowa, Kansas, Mississippi, Missouri, New Mexico, and Pennsylvania. *Id.* In Arkansas, California, Florida, Georgia, Nebraska, Nevada, New York, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wisconsin, and Wyoming the state administers all local use taxes. *Id.* Thus, in each of these 40 states, the mail-order seller with a duty to collect all local use taxes files just one return. The remaining states, Alabama, Alaska, Arizona, Colorado, Idaho, Louisiana, and Minnesota permit at least some jurisdictions to administer their own use taxes. There are 65 such jurisdictions in Alabama, 10 in Alaska, 9 in Arizona, 32 in Colorado, 3 in Idaho, 64 in Louisiana, and 1 in Minnesota. *Id.* If these numbers are added to the previously cited 40 returns in the one-return-per-state states and the state-level returns in these states are also accounted for (taking into account that the State of Alaska

While the maximum potential administrative burden of filing 230 tax returns on a monthly or quarterly basis is certainly manageable and many interstate sellers do so regularly, this filing duty should not be ignored or unduly minimized. Even though the smaller-sized mail order businesses would not be filing in all taxing jurisdictions, the compliance costs for these mail order companies can be significant in relation to the potential revenues to be collected. The Missouri General Assembly did its part to address the concern for the out-of-state sellers' compliance burdens by adopting a uniform, statewide use tax rate for its local jurisdictions and removing even the potential for requiring such sellers to track shipments into and rates in Missouri's 1,573 local jurisdictions.

Compliance with a local use tax collection duty by both in-state and out-of-state sellers of taxable goods generally requires that (i) the local tax-levying jurisdiction(s) overlaying the destination of the shipment be identified, (ii) the use tax rate(s) applicable to the transferred goods be identified, (iii) the tax on the transaction be calculated and collected from the purchaser, (iv) the tax due to each individual local jurisdiction on the transactions be summed at the end of the reporting period and the sum be entered at the appropriate place on the

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does not levy a sales tax), a grand total of 230 returns is obtained. See also: John L. Mikesell & Mark D. Brown, *How Big Is the Local Use Tax Problem for Mail-Order Vendors?*, 3 STATE TAX NOTES 309 (August 31, 1992).

periodic tax return, (v) the tax return be timely filed, and (vi) the tax due be remitted.[4] The Missouri General Assembly, by its enactment of § 144.748, even removes from the out-of-state seller's duties, steps (i), (ii) and (iv) – the identification and calculation of local use taxes on a jurisdiction-by-jurisdiction basis – because the uniform use tax rate of 1.5% applies in all local jurisdictions. The very steps characterized as overly burdensome by mail order industry representatives in their submissions to the Court in the *Bellas Hess* and *Quill* cases were eliminated by Missouri. In doing so, mathematical precision and identical treatment between in-state and out-of-state sellers was sacrificed to a limited extent. The result is that, with respect to 93.14% of the sales transactions that would occur in the state, in-state retailers had to collect sales tax at rates equal to or greater than the use tax rates that out-of-state sellers would have had to collect on identical transactions. The complaint here is not that in-state sellers were being discriminated against by having to collect state and local sales tax

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[4] Modern computer capabilities and computer support services can effectively respond to these compliance requirements. Specialized computer software programs provide sales and use tax rate information for every tax jurisdiction in the United States and update that information monthly. These programs integrate the state and local tax rates into the direct marketer's billing systems and calculate the tax due on each sale. Finally, they automatically generate all required sales or use tax returns for each tax jurisdiction. *See* Westphal, *The Computer's Role in Simplifying Compliance with State and Local Taxation*, 39 Vanderbilt Law Review 1097 (1986).

at the same or greater rates than out-of-state sellers in 93.14% of the statewide sales transactions, but that 6.86% of the total taxable out-of-state sales would have borne a greater use tax than sales tax burden. (Brief for Petitioners at 7). Should the Commerce Clause tolerate such a disparity when, on a statewide basis, Respondents have shown that intrastate commerce bore more of a total statewide sales tax burden than the use tax burden borne by transactions in interstate commerce? For the reasons discussed below, *Amicus* MTC submits that the Commerce Clause has the capacity for such tolerance under the circumstances of this case.

C. Where a Challenged Tax Statute Does Not Discriminate Against Interstate Commerce Beyond a *De Minimis* Amount, No Violation of the Interstate Commerce Clause Occurs.

As noted above and as demonstrated by Respondents, there has been no case made out for any discrimination against interstate commerce under these circumstances. However, should the Court conclude there were sufficient disparity of local government tax rates to require further analysis, that analysis should result in upholding Missouri's use tax system. Where, as here, a challenged tax system has not been adopted as an act of "economic protectionism" and operates, in general, to benefit interstate commerce when viewed on a

statewide basis, the Court, in determining compliance with the Commerce Clause, should take into account (i) the problems sought to be addressed by the State Legislature, (ii) the practical operation of the tax, and (iii) the degree to which interstate commerce is subjected to any burden or discrimination. This Court has early on limited its invalidation of state regulatory and tax statutes under the dormant Commerce Clause to circumstances in which the statute subjects interstate commerce to interference with the power of Congress to regulate commerce among the several States. See, *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). In an early tax case, *Hump Hairpin Co. v. Emmerson*, 258 U.S. 290, 295 (1922), the Court noted that the burden imposed must be one that "amount[s] to a genuine and substantial regulation of, or restraint upon [interstate commerce] [and not] whether it affects it only incidentally or remotely so that the tax is not in reality a burden, although in form it may touch and in fact distantly affect it." It is the "operation and effect of the statute as applied and enforced by the State" that is the principle focal point. *Gregg Dyeing Co. v. Query*, 286 U.S. 472, 476 (1932). In upholding a gas consumption tax that was arguably discriminatory on its face, this Court has said:

> "Discrimination, like interstate commerce itself, is a practical conception. We must deal in this matter, as in others, with *substantial distinctions and real injuries. Shaffer v. Carter*, 252 U.S. 37, 55. . . . Appellants have

> the burden of showing an injurious discrimination against them because they bought their gasoline outside the State. This burden they have not sustained. They have failed to show that whatever distinction existed in form, there was any *substantial discrimination in fact. Id.* at 481-2 (emphasis added).

In *General American Tank Car Corp. v. Day*, 270 U.S. 367 (1926), the Court dealt with a tax system analogous to that presented in this case. There, the Court upheld a Louisiana "in lieu" 25-mill property tax payable on non-resident tank cars used to transport oil in interstate commerce. Payment of the in lieu tax exempted the non-residents from local government property taxes imposed throughout the Louisiana parishes and municipalities. The statewide local property tax rate was found to average "approximately" 25 mills and, since the questioned tax was considered by the Court to be *"substantially the equivalent* of the local tax in lieu of which it was assessed, there was no unjust discrimination" under the Commerce Clause. *Id.* at 373 (emphasis added). In discussing the application of the Equal Protection Clause, but upholding the in lieu tax on both Equal Protection and Commerce Clause grounds, the Court reasoned that:

> *"Where the statute imposing a tax which is in lieu of a local tax assessed on residents, discloses no purpose to discriminate against non-resident taxpayers, and in substance does not do so, it is not invalid merely because equality*

> *in its operation as compared with local taxation has not attained mathematical exactness.* In determining whether there is a denial of equal protection of the laws by such taxation, we must look to the fairness and reasonableness of its purpose and practical operation, rather than to the minute difference between its application in practice and the application of the taxing statute or statutes to which it is complementary." *Id.* (Emphasis added).

Petitioners seek to scuttle the application of this Court's decision in *General American* by simply describing it as a "derelict hazard confusing lower courts" and suggesting that the case "either be moored to its facts or sunk." (Brief for Petitioners at 29). In this regard, Petitioners bring to mind the similar plea that Captain Ahab likely uttered as Moby Dick began its final dive to the deep – "Someone, please cut me loose from this big whale or I am lost!". No matter how hard Petitioners would wish to be cut loose from the principles set forth in *General American*, mere wishing will not make it so. A review of all of the facts and circumstances of the adoption of Missouri's local use tax statute and its practical effect shows that any discrimination that may possibly exist falls way short of being genuine and substantial.

D. The Court Should Apply a Contextual Balancing Inquiry Where Discrimination Against Interstate Commerce Exists, but Where There Has Been No Legislative Purpose To Promote Economic Protectionism

In circumstances in which a state legislature had enacted a discriminatory tax statute, one of the purposes of which was "economic protectionism" for its local businesses, this Court has, in the interest of advancing the important principles underlying the Commerce Clause, held that the inquiry ended right there and the discriminatory tax was invalidated. See, *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). Where, however, a discriminatory tax statute is shown to have been adopted in the service of legitimate state interests, then a contextual balancing approach – one that weighs the state interests against the effect on interstate commerce and asks whether reasonable alternatives were available for protecting those state interests – remains appropriate. As discussed below, the Court's recent decisions provide ample support for applying the more flexible, balancing approach under the facts of this case.

Petitioners' reliance on cases such as *New Energy Co. of Indiana v. Limbach*, 486 U.S. 263 (1984) and *Chemical Waste Management, Inc. v. Hunt*, ___ U.S. ___, 112 S.Ct. 2009 (1992), for the suggestion that no contextual balancing is permitted here is not only misplaced, but those cases suggest quite

the opposite is true. The rule this Court should apply here is one that recognizes that where economic protectionism was not intended by the legislature, the Court may take into consideration whether a legitimate state interest is advanced by the challenged measure and, if so, whether reasonable non-discriminatory alternatives were available to the state. Where, as here, competitive equality with reduced administrative burdens were the state's goals, not the protection of in-state businesses, there should be no violation of the Commerce Clause if no reasonable, non-discriminatory measures were available to obtain the legislative goals.

1. There is No Economic Protectionism Here

In *Bacchus,* this Court found that the challenged state tax exemption resulted from "economic protectionism" based upon both its discriminatory purpose and discriminatory effect. *Bacchus,* 468 U.S. at 270. There, the Court clearly indicated that since the enactment of the discriminatory tax statute was motivated by economic protectionism (to aid Hawaiian industry), no balancing of interests would be engaged in by the approach permitting inquiry into the balance between local benefits and the burden on interstate commerce." *Id.*

Unlike the circumstances in *Bacchus,* here there was no discriminatory purpose in the adoption of Missouri's local use tax. The tax operates, in the

main, to provide a complement to the state's local sales tax system, even though precise mathematical equivalence or absolute equality did not result between all in-state and out-of-state transactions. The purpose underlying the legislation was to reduce the degree of tilt in the playing field of tax burdens between in-state and out-of-state transactions while, at the same time, to reduce administrative complexities on out-of-state transactions. See, *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937). These are legitimate state concerns. Therefore, substantial equality, not precise mathematical equivalency should satisfy Commerce Clause requirements; and no *per se* rule should apply to invalidate Missouri's efforts here.

2. Even Should Missouri's Use Tax System be Found Discriminatory, It Remains Constitutional Where, Even Under Strict Scrutiny, It is Shown to Advance a Legitimate State Interest and No Non-Discriminatory Measures are Otherwise Available

If the Court determines the tax effects of an allegedly discriminatory tax statute has a "genuine and substantial" and not an "incidental or remote" effect upon interstate commerce, that should not end the inquiry. In *New Energy Co.*, this Court articulated the principle that where a tax or regulatory measure is not enacted with a purpose to disadvantage interstate interests, that measure may

still be valid. Noting that such a measure will be subject to the strictest of scrutiny, the Court stated:

> "Our cases leave open the possibility that a State may validate a statute that discriminates against interstate commerce by showing that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives. . . . This is perhaps just another way of saying that what may appear to be a 'discriminatory' provision in the constitutionally prohibited sense – that is, a protectionist enactment – may on closer analysis not be so. However it be put, the standards for such justification are high." (Citations omitted). *Id.* at 278.

In *Chemical Waste Management,* this Court addressed the discriminatory aspects of a state imposed fee for the in-state disposal of hazardous waste generated outside the state. The Court again provided the opportunity to the state to advance justification for the facially discriminatory statute by providing that:

> "[b]ecause the additional fee discriminated both on its face and in practical effect, the burden falls on the State 'to justify it both in terms of the local benefits flowing from the statute and the unavailability of non-discriminatory alternatives adequate to preserve the local interests at stake.' " *Id.* at 2014.

In finding other non-discriminatory measures available to the state to protect the safety and health of Alabama citizens, the Court struck down the measure as violative of the Commerce Clause prohibition against discrimination against interstate commerce. Quoting the test it recently reiterated in *Wyoming v. Oklahoma,* 502 U.S. ___, 112 S.Ct. 789, 801 (1992), the Court concluded that the State failed to carry its burden of showing that "the discrimination is demonstrably justified by a valid factor unrelated to economic protections." *Chemical Waste* at 2015. See also, *Kraft General Foods, Inc. v. Iowa Dep't. of Revenue and Finance,* ___ U.S. ___, 112 S.Ct. 2365 (1992).

Petitioners rely on *Halliburton Oil Well Cementing Co. v. Reily,* 373 U.S. 64 (1963) and *Ft. Gratiot Sanitary Landfill, Inc. v. Michigan Dep't. of Natural Resources,* 112 S.Ct. 2019 (1992) to support their opposition to Missouri's sales/use tax system. In *Halliburton Oil,* the Court invalidated a Louisiana use tax which included in its base certain transactions that were not included in the sales tax base. This discrepancy created the effect of favoring all in-state sales of certain goods over all out-of-state sales of the same goods. Hence, the Court held that the statute was unconstitutional under the Commerce Clause. In *Ft. Gratiot,* the state enacted a statute that prohibited solid waste generated in another county, state, or country from being accepted for disposal, unless explicitly authorized in the receiving county's plan. Therefore, the statute discriminated based upon the origin of the

waste being from out-of-state. Ft. Gratiot challenged the statute as discriminating against interstate commerce and the Court invalidated the statute on that ground.

Halliburton Oil and *Ft. Gratiot* can be distinguished from the facts here, since the Missouri statute was not enacted with a purpose to favor in-state transactions over those in interstate commerce; Missouri's local use tax system discriminates, if at all, against *in-state* transactions on a statewide basis; and it results in greatly reduced compliance costs for interstate sellers required to collect Missouri's use taxes. As indicated above, the state merely attempted to comply with this Court's concerns in *Bellas Hess* over the compliance burdens faced by multijurisdictional corporations. As a result, the Missouri "in lieu" use tax should be viewed as serving legitimate state interests.

3. No Reasonable Non-Discriminatory Alternative Method Is Available to Secure the Legitimate Interests Sought to be Obtained by Missouri's Local Government Use Tax Law.

The Missouri law challenged here was designed to serve several interests at the same time – (1) to bring the overall sales/use tax burden between in-state and out-of-state transactions closer together by closing a local government use tax hole in its tax system; (2) to substantially reduce the compliance burdens associated with the collection

of local government use taxes – all while (leaving its local governments with some authority to impose local sales taxes. Petitioners suggest three alternatives to what Missouri has enacted. (Brief of Petitioners at 28, fn. 16.) None of the alternatives they set forth reasonably deal with Missouri's concerns. One suggestion is for Missouri to follow those states that impose statewide sales taxes and statewide use taxes at the same rate. This alternative would require the Missouri legislature to preempt the system that is in existence that permits local government discretion and control over raising their own revenue through the use of local sales taxes. The other two alternatives suggested by Petitioners would result in a myriad of local use tax rates being adopted throughout Missouri's 1,573 local government taxing jurisdictions. As noted by this Court in other state tax contexts – states need only adopt "realistic legislative solution[s]" and are not required to "adopt a tax which would 'pose genuine administrative burdens' ". *Goldberg v. Sweet*, 488 U.S. 252, 264 (1989)(quoting from *American Trucking Assns., Inc. v. Scheiner*, 483 U.S. 266 (1987)). Like Petitioners here, *Amicus* MTC does not have any reasonable alternative to Missouri's to offer the Court that would meet all of the legitimate concerns sought to be addressed by Missouri. Missouri's local use tax system should not be invalidated under these circumstances.

II. THE COURT'S DECISION IN THIS MATTER WILL BEAR GREATLY UPON THE ABILITY OF THE STATES TO ADDRESS THE PROBLEM OF USE TAX COLLECTION ON MAIL ORDER SALES SHOULD CONGRESS NOT ACT TO PASS PENDING LEGISLATION

As indicated by the *General American* case, the notion of a uniform statewide tax rate that would replace or be "in lieu" of a myriad of local tax rates is at least 70 years old in the property tax area. Over the past several years, the states and others have attempted to introduce the "in lieu" local use tax concept on a national level to address the compliance burdens complained of by the direct marketing industry. The list of Congressional bills introduced on the subject are set forth in the Court's opinion in *Quill,* 504 U.S. ___, 112 S.Ct. 1904, 1916, fn. 11. Several of these bills (e.g., H.R. 2230, 101st Congress) contained provisions for uniform statewide fees in lieu of local use taxes. In the face of a blizzard of mail orchestrated by the Direct Marketing Association, these earlier efforts to obtain federal legislation failed.

The Court in *Quill* has suggested that Congressional failure to address the use tax problem with mail order sellers "may have been dictated by respect for our holding in *Bellas Hess* that the Due Process Clause prohibits the States from imposing such taxes, but today we have put that problem to rest." *Id.* at 1916. As a result of this Court's suggestion, the states and others are once again before

Congress in an effort to require the larger interstate sellers over whom the states have taxing jurisdiction consistent with the Due Process Clause, to collect the state level use taxes and certain local government use taxes from their in-state customers. For the bill introduced by Senator Dale Bumpers of Arkansas on February 3, 1994, see S. 1825, 103d Cong., 2nd Sess., Cong. Rec. S802 – 806 (February 3, 1994).

Amicus Commission would like to believe, as this Court suggested in *Quill*, that Congressional reluctance to pass earlier legislation may have resulted from Congress' respect for its holding in *Bellas Hess*. If such is the case, Congressional action in this matter may now be determined by what is fair and reasonable as a matter of public policy. If such is the case, S. 1825 will surely pass in some form and authorize states to adopt its uniform "in lieu fee" approach to deal with the compliance burdens that are claimed to be inherent in the collection of local government use taxes. Passage of the pending federal legislation will permit interstate sellers to concern themselves with only one tax rate in each of the 47 states that impose state and/or local sales and use taxes; and, therefore, the Commerce Clause concerns addressed in *Bellas Hess* and *Quill* would be resolved by Congressional action.

However, let us assume that what is fair and reasonable as a matter of public policy again does not prevail in Congress, as not all fair and reasonable measures are enacted. The competitive transactional tax imbalance in favor of out-of-state sellers

and the compliance burdens faced by some, but not all out-of-state sellers, will remain in place. The states will have no effective means to achieve either tax parity or compliance, unless they are permitted to bring these issues back to the Court in some fashion. This Court has alluded to the possibility of re-examining its Commerce Clause holding in *Quill* after Congress has been given an opportunity to act in this matter. There the Court stated that:

> " . . . Congress is now free to decide whether, when, and to what extent the States may burden interstate mail-order concerns with a duty to collect use taxes. Indeed, even if we were convinced that *Bellas Hess* was inconsistent with our Commerce Clause jurisprudence, 'this very fact [might] giv[e us] pause and counse[l] withholding our hand at least for now." *Quill*, 504 U.S. ___, 112 S.Ct. 1916.

However, after *Quill*, it will be the rare State Tax Administrator (one who is either a daredevil at heart or clearly judgment-proof) that will press the matter again. Even though this Court quite appropriately denied the Petition for *Writ of Certiorari* in *State v. Quill*, 500 N.W.2d 196, *cert. denied*, 114 S.Ct. 173 (1993), on the issue of awarding attorney's fees under the Civil Rights Act, that denial of review will not provide sufficient enough support and comfort to State Tax Administrators, their counsel and State Attorneys General to overcome the biting chill currently produced by 42 USC §§1983 and 1988 and *Dennis v. Higgins*, 498 U.S. 439 (1991). The

51 State Tax Administrators form a relatively small and well-informed community. They have certainly not failed to take notice of cases, such as *Swanson v. Powers*, 937 F. 2d 965 (4th Cir. 1991), in which a *personal* judgment was awarded in the trial court (although later reversed) in the amount of $140,000,000 against the Secretary of the North Carolina Department of Revenue for collecting a tax this Court subsequently held violative of the intergovernmental tax immunity act (4 USC 111) in *Davis v. Michigan Dep't. of Treasury*, 489 U.S. 803 (1989).

In most, if not all states, legislative enactments are presumed valid and, therefore, are required to be enforced by State Tax Administrators. Where reasonable persons might differ as to the constitutionality of a newly enacted tax statute, a great amount of pressure on State Tax Administrators develops from the interplay between the duty to enforce the law and the potential for personal liability for damages and/or attorneys' fees. The State Tax Administrators are placed squarely between the proverbial "rock" of their legislatures and the "hard place" of recent-evolving Commerce Clause jurisprudence (which has become a lot less forgiving). Given the great changes occurring in the national and international economy and the disappearance of state and national commercial boundaries, state tax enactments that are intended to bring parity to the taxation of in-state and out-of-

state competitors, as well as to reduce tax compliance burdens, should be encouraged, not discouraged. Missouri's enactment here is one such meritorious effort that should be approved by this Court.

Because State Tax Administrators currently operate in a very litigious environment when they attempt to collect taxes due from well-financed national and multinational businesses, the ruling in this case will be a most crucial signal from the Court. Absent Congressional action adopting a solution to the mail-order problem, the states will be left with a weak foundation upon which to build any effective use tax collection compliance from an ever-increasing segment of our economy – the out-of-state sellers. Some states may try to adopt, as Missouri did here, appropriate measures designed to end the reverse tax discrimination against its in-state sellers and, at the same time, to try reducing the burdens of complying with local government use tax laws. Such measures may provide a reasonable alternative ground between requiring mail order sellers to collect all locally-imposed use taxes and the *status quo*, which exempts a large part of out-of-state sellers from collection responsibility. Such measures would substantially relieve local retailers from their current competitive disadvantage and would permit the states centralized collection of needed and lawfully owed revenue.

Had this Court been faced with an acceptable statewide, uniform in lieu local government use tax system in *Quill*, this Court could reasonably have found the burden on interstate commerce to have been well within tolerable limits and, therefore, not in violation of the dormant Commerce Clause. Therefore it is most vital that the Court's opinion in this case either clearly approve the Missouri use tax system or clearly approve the concept of an in lieu measure with regard to local government use taxes. A state could then more intelligently attempt to fashion an appropriate in-lieu measure and a State Tax Administrator wishing to bring this issue back before this Court could then more freely and fairly seek to enforce state and local use tax collection from interstate sellers, even those with only an in-state "economic presence". It is this opportunity for further review and articulation of the Court's *Quill* holding that should be left available to the states under the Court's ruling in this case.

CONCLUSION

For the reasons set forth above, Missouri's in-lieu local use tax system is consistent with the Commerce Clause and, therefore, the decision of the Supreme Court of Missouri should be affirmed.

Respectfully submitted,

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